No. 15,594

IN THE

United States Court of Appeals

For the Ninth Circuit

MILTON MAYER,

Appellant,

vs.

ERNEST WRIGHT, Regional Commissioner of Internal Revenue Service and HAROLD HAWKINS, District Director, Internal Revenue Service,

Appellees.

Appeal from the United States District Court for the Northern District of California, Southern Division.

Honorable Louis E. Goodman, Trial Judge.

APPELLANT'S OPENING BRIEF.

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JURISDICTION.

This is an appeal from an order of the Trial Court granting Appellees' Motion to Dismiss (Tr. 46, 47) and dismissing the cause (Tr. 47).

The District Court had jurisdiction of the issues raised by the Complaint for Declaratory Judgment and for Injunction (Tr. 3-44) under the laws and the

Constitution of the United States; the Declaratory Judgments Act (28 U.S.C.A. Sec. 2201-2); the Injunction Act (28 U.S.C.A. Sec. 272(a) and 3653(b)). The jurisdiction of the District Court arose particularly under the First Amendment to the Constitution and also under Title 32, National Defense Chapter XVI, Selective Service System, Par. 1622.14 (32 C.F.R. Sec. 1602 et seq).

The District Court had jurisdiction of the issues raised by Complaint also under the Universal Military Training and Service Act (50 App. U.S.C.A. Sec. 451 et seq.) and further under Title 28, U.S.C.A. Sec. 1431, et seq. (Tr. 3, 4, 13, 14, 17-20.)

The jurisdiction of the District Court was invoked by the Complaint under the Constitution and the above Statutes on the ground that Appellant is and was a conscientious objector to war in any form, and that payments of those parts of his income taxes that were used for war purposes and military preparation are contributions to war, contrary to his conscience. (Tr. 4-16.) Appellant was compelled by Appellees to pay the full amount of his taxes (Tr. 16, 17) and for the purpose of obtaining a Declaration of his rights and for the purpose of restraining the Appellees from further collection of the war-designated parts of his taxes, this cause was instituted. (Tr. 20-22.)

The order of the District Court (Tr. 47), while not stating so, must be assumed to be tantamount to holding that the Court has no jurisdiction.

This Court has jurisdiction of this appeal under 28 U.S.C. 1291 and 1294.

STATEMENT OF THE CASE.

Facts.

The facts presented by the Complaint are not and cannot be in dispute, since the cause was dismissed on defendants' motion to dismiss. (Tr. 47.)

The plaintiff is a citizen of the United States, residing in the State of California. (Tr. 4.) Defendants are sued in their official capacity, Wright as Regional Commissioner of Internal Revenue, San Francisco Region, Hawkins as District Director of Internal Revenue Service of San Francisco. (Tr. 4.)

Plaintiff, because of his religious training and belief, is and was for years past conscientiously opposed to participation in war or in military preparation. (Tr. 4.) His conscientious objection is emanating from his belief in a Supreme Being. (Tr. 4.) He gave oral and written expression of his conscientious objection to war and to military preparation during the past sixteen (16) years, or more. (Tr. 4.)

Among the written statements that plaintiff made about his position as a conscientious objector to war is an article printed in the Saturday Evening Post of October 17, 1939 (Tr. 5 and Exhibit "A"); one in the Christian Century of July 12 and 19, 1944 (Tr. 5, Exhibits "B" and "C"); one in The Commonweal of October 23, 1953 (Tr. 5, 6 and Exhibit "D").

Plaintiff attended regularly since about 1940 Meeting for Worship of the Religious Society of Friends (Quakers). (Tr. 6.) He is an active participant in the activities of the Friends Meetings and leading

Quakers of the country recognized plaintiff's lectures, articles, etc. as expressing the Quakers' pacifist position. (Tr. 6.) Plaintiff lectured extensively since 1940 for the Quakers, both here and abroad. (Tr. 6.)

Plaintiff was and is a member of various pacifist organizations and, as a member of the Peacemakers and in witness of his conscientious objection to war, he returned his Selective Service Classification Card to the President of the United States. (Tr. 6, 7.)

When in 1941 his local Selective Service Board refused plaintiff's request to be classified as a conscientious objector to war, he informed said Board that if called upon he would be unable to serve, either in combatant or in noncombatant capacity. (Tr. 7.)

Plaintiff, having reached the age beyond which the Selective Service System has no jurisdiction over him, felt compelled to continue his refusal to participate in war or in preparation therefor in any form. In consequence, he informed the Internal Revenue Service of his inability in conscience to pay that part of his Federal Income Tax which is budgeted for purposes of war or military preparation. (Tr. 7.) It was in 1948 when he first expressed his refusal to contribute to war or military preparation by payment of the military portion of his Federal Income Tax, and he so wrote to the President of the United States. (Tr. 8.)

In January, 1953, while plaintiff resided in the City of Chicago, he wrote to the Collector of Internal Revenue of that city, explaining why he, as a con-

scientious objector, was unable to pay that part of his Federal taxes that are budgeted and expended for war purposes. (Tr. 8.) He paid with his United States Individual Income Tax Return for 1952 "50% of the tax claimed due, in the amount of $99.38". (Tr. 8.)

With reference to the payment of $99.38, plaintiff wrote to the Collector of Internal Revenue that the same is one-half (½) of his 1952 tax due, i.e. $198.78, and that "he cannot" as a religious objector to military service

> "perform the military service here asked of me—the purchase of armaments . . . I accept gladly my obligation to maintain its (Government's) free and peaceful institutions however large a share of my earnings they require. If you will inform me of any means whereby I may do so through payment to the Treasury Department, I shall immediately remit such payment in the amount of the balance deemed due in Income Tax for 1952 . . . I do not wish to contend with my Government, least of all in the matter of percentages. I have, therefore, taken the obviously conservative figure of 50 as that percentage of the current United States Budget now used for the purchase of armaments, and I have calculated my Income Tax payment for 1952 accordingly." (Tr. 9, 10.)

In August 1953 the Chicago District Director acknowledged the receipt of $99.38, but also advised plaintiff that the laws and regulations provide no relief from payment of tax on the grounds advanced by him. The Internal Revenue Department

demanded payment of the withheld one-half (½) of plaintiff's 1952 tax, "less the payment of March 16, 1953 in the amount of $66.00." (Tr. 10.)

(The credit of $66.00 represents an involuntary payment. (Tr. 10, Exhibit "E".))

Plaintiff received two notices from the Internal Revenue Service (Tr. 10) both in 1953 and referring to the tax withheld by him in the amount of $32.78. (Tr. 11.) After a conference in the Chicago Collection Office, plaintiff wrote again to the Revenue Service that:

> "The $32.78 (plus interest) claimed by Government and acknowledged due in my 1952 income tax return and the letter which accompanied it, I have withheld on principle and as a protest against the Government's expenditure of most of its revenues for the destructive purposes of militarism and war.
>
> I contest the Government's claim, not to the money but the use to which it puts the money . . . I will gladly pay the amount claimed (plus interest) if it can be allocated to any constructive public purpose. If there is any way in which this can be done, I shall appreciate being informed . . ." (Tr. 11.)

The Chicago District Director answered plaintiff and accepted plaintiff's statement that his refusal to pay that part of his taxes which were to be used for war purposes was based on his conscientious objection to war in any form; however, since "the law provides no relief from payment of the tax on such grounds"

the Director found no alternative but to proceed with the collection of the $32.78 (plus interest). (Tr. 12.)

A Warrant of Distraint was issued against the plaintiff from the Director of Internal Revenue, Salinas, California (plaintiff at that time resided in Carmel, California (Tr. 12)). The amount of taxes due for 1952 was $32.78 and interest thereon amounted to $2.50 for a total claim of $35.28. (Tr. 12 and Exhibit "F".)

On May 29, 1954, plaintiff wrote to the Salinas Office of the Revenue Service, restating that the nonpayment of part of his 1952 taxes was a matter of principle directed against the war-spending of part of the taxes and asked that the execution of the Warrant of Distraint be postponed until he had a chance to present a brief in support of his position to the Commissioner of Internal Revenue. (Tr. 13 and Exhibit "G".)

Plaintiff's brief to the Commissioner (August 15, 1954) stated that:

> "I am a conscientious objector to participation in war, and have been publicly identified as such since 1939. I have come to the conclusion that I can not, in conscience, and in love of my country, encourage my country's government to spend my country's substance in the killing of my innocent fellow-men anywhere, or in preparation for killing them, or in preparing any fellow-Americans of military age to kill or to be killed . . .
>
> The $32.78 plus $2.50 interest claimed by the Internal Revenue Service in the present matter

> represents 50% of the balance due, as of March 15, 1953, of my 1952 income tax. I withheld 50% of the amount claimed on the basis that at least 50% of my income tax is used for purposes which I can not in conscience support . . ." (Tr. 13, 14 and Exhibit "H".)

Plaintiff in his brief to the Commissioner (Exhibit "H") requested that the Government

> ". . . make it possible for me to pay the full amount of my income tax in conscience. I wish to pay the amount claimed, and any and all other amounts my Government may claim, for any and all purposes which I can recognize, in simple conscience, as consistent with or conducive to the general welfare. If the amount claimed here can be so paid in, and so used, I shall pay it not only voluntarily, but gladly.
>
> Until this protest of mine can be resolved, either by my Government's allowing me to pay the full amount of my taxes for purposes of general welfare, or by legal proceedings in which I may challenge my Government's right to tax me against my conscientious and religious precepts . . ." (Tr. 14, 15 and Exhibit "H"),

he asked that the Warrant be withheld.

Plaintiff's brief (Exhibit "H") was answered by the Treasury Department on September 2, 1954, stating:

> ". . . appreciates the sincerity of your views in this matter, the federal income tax laws . . . apply uniformly to every individual . . ." (Tr. 15.)

Plaintiff received no relief from the Treasury Department, nor from the District Director of Internal Revenue. To the contrary, the defendants obtained from plaintiff information as to names and addresses of his employers, proceeded and did collect on March 4, 1955 the sum of $36.55. (Tr. 16, 17 and Exhibit "F".)

Plaintiff claims that the action of the defendants in collecting said tax was in violation of the Constitution of the United States and laws made thereunder.

Plaintiff's complaint (Tr. 3-22) asked that the court declare his rights under the issues raised (Tr. 20). He asked that the defendants be ordered to refund the sums of $36.55 and $66.60, as having been collected illegally; that the defendants and all others acting pursuant to their direction be restrained from attempting to collect from him for the years subsequent to 1952 that part of his Federal income tax that is budgeted for war purposes. (Tr. 21.)

Plaintiff's complaint had attached to it his lawyer's affidavit. (Tr. 43-44.)

On the date of the filing of the Complaint (i.e. December 17, 1956) the District Court issued an Order to Show Cause and Temporary Restraining Order. (Tr. 45, 46.) Pursuant to this Order the defendants were to appear before the Honorable O. D. Hamlin, one of the Judges of the District Court on the 27th of December, 1956, then and there to show cause why

a preliminary injunction should not issue as prayed for in the complaint. (Tr. 45, 46.)

Defendants filed on February 15, 1957 their Notice of Motion to Dismiss, to be heard on March 4, 1957 (heard in fact on March 18, 1957). (Tr. 46.)

Defendants moved for the dismissal of the action on four grounds:

(1) The complaint fails to state a claim upon which relief can be granted.

(2) and (3) The court lacks jurisdiction, since the action is for declaratory relief with respect to Internal Revenue Taxes, and is for an injunction to restrain collection of Federal income taxes.

(4) Indispensable parties are not joined. (Tr. 46, 47.)

On March 18, 1957, the trial judge, the Honorable Louis E. Goodman, granted defendants' Motion to Dismiss and ordered that the cause be dismissed. (Tr. 47.)

Plaintiff filed his Notice of Appeal (Tr. 48), his Cost Bond (Tr. 48, 49), his Statement of Points (Tr. 52, 53), and Designation of Record (Tr. 53, 54).

Questions Involved.

1. As a matter of law, is a conscientious objector to war in any form, who is not of draft age, entitled to the same exemption as conscientious objectors of draft age, and, therefore, is he to be relieved of the payment of that part of Federal Income Tax that is used for the purpose of and preparation for war?

2. As a matter of law, is the exemption from military service given to conscientious objectors of draft age and the refusal to exempt objectors beyond draft age from their part in military preparation, class legislation forbidden by the Constitution of the United States?

3. As a matter of law, is the forcible collection of that part of the taxes that is spent for war purposes, from one who because of religious belief and training is opposed to war in any form, contrary to the First Amendment to the Constitution of the United States?

4. The courts have held that contribution to war in any substantial form, prior to induction, is in conflict with the claim of conscientious objection to military service. As a matter of law, will a conscientious objector lose his status as such if he so pays that part of his taxes that is spent for war preparation, because payment of such tax is contribution to war in a substantial form?

5. The draft age is subject to Congressional change, and therefore, one who is beyond draft age may become subsequently subject to draft. As a matter of law, will a conscientious objector beyond draft age who, prior to being conscripted, pays that part of his taxes that is spent for war purposes, become subject to military service (if the draft age is raised) because his contribution to war in the form of his tax payment deprived him of his claim to be recognized as a conscientious objector to war?

6. As a matter of law, is a conscientious objector to war in any form, who is beyond draft age, entitled to a declaration of his rights with reference to his refusal to pay that part of his taxes that are spent for war purposes?

7. As a matter of law, is a conscientious objector to war in any form, who refuses to pay that part of his taxes that is spent for war purposes, entitled to a restraining order against forcible attempt to collect such tax?

SPECIFICATION OF ERRORS.

1. The trial court erred in ordering that the complaint be dismissed on the ground that it failed to state a claim against defendants upon which relief can be granted. (Tr. 46, 47 and 52.)

2. The trial court erred in dismissing the complaint for lack of jurisdiction in an action for declaratory judgment with respect to Internal Revenue Taxes. (Tr. 46, 47 and 52.)

3. The trial court erred in dismissing the complaint for lack of jurisdiction in an action for a restraining order against collection of Federal Income Tax. (Tr. 46, 47 and 52.)

4. The trial court erred in dismissing the complaint directed against the Regional Commissioner and the District Director of Internal Revenue, on the ground that the plaintiff failed to join unnamed, indispensable parties.

STATUTES INVOLVED.

Plaintiff claims that under the Constitution of the United States and particularly under the First Amendment thereto, Congress cannot make a law which in effect prohibits him from exercising his religion freely.

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ."
>
> First Amendment to the Constitution of the United States.

Plaintiff claims that he is entitled to the same recognition as a conscientious objector as that given to those of draft age. In absence thereof the Universal Military Training and Service Act becomes class legislation forbidden by the Constitution.

Title 50 App. U.S.C.A., Sec. 451 et seq.

See also:

55 Stat. 1600 (Declaration by United Nations and The Atlantic Charter);

Fourteenth Amendment to the Constitution of the United States;

Constitution of Illinois, 1870, Art. XII, Sec. 1, amended;

26 U.S.C.A., Sec. 7421;

28 U.S.C.A., Secs. 272(a) and 3653(b);

28 U.S.C.A., Secs. 1291 and 1294;

28 U.S.C.A., Sec. 1431 et seq.;

28 U.S.C.A., Secs. 2201-2;

32 U.S.C.A., Sec. 1622, 14.

ARGUMENT.

PRELIMINARY REMARKS.

The Transcript of Record is silent as to any one of the grounds upon which the trial court dismissed the cause. The order of March 18, 1957 (Tr. 47) grants defendants' motion to dismiss the cause and dismisses the cause without specifying the ground for such order.

Defendants' Notice of Motion to Dismiss (Tr. 46, 47) indicates that they will move the court to dismiss the complaint on four grounds. The order of the court dismissing the cause could have been therefore bottomed on any one of four grounds raised by the defendants. It could have been bottomed on all, or on any combination of the four points raised. Since plaintiff is not advised which one of the four grounds raised by defendants was the basis of the trial court's order of dismissal, he will have to assume that all four reasons were accepted by the court. Because of that plaintiff will have to argue against all four points of defendants' motion to dismiss.

It is proposed that plaintiff in this brief first argues the positive points raised by his complaint to show this court why the prayers of the complaint should have been granted and why the trial court, in denying them, was in error. Thereafter, wherever it is necessary to overcome defendants' reasons which were the basis of their motion to dismiss, plaintiff will present argument in opposition thereof and for the purpose of showing why the trial court erred in granting said motion and dismissing the cause.

SUMMARY OF ARGUMENT.

Plaintiff is a religious objector to war and to any form of preparation for it. His conscientious objection is of long standing and because of lectures and writings on this subject, his position is and was well known in this country and abroad. His pacifist position is recognized and accepted as that representing the pacifist position of the Society of Friends (Quakers) who requested plaintiff to, and he did, lecture on the subject matter of religious objection to war for and on behalf of the Quakers here and abroad. Plaintiff was for years and is now active in various religious pacifist organizations.

During the war of 1941-1945, and while still of draft age, plaintiff informed his Draft Board that because of his religious training and belief he was opposed to participation in the war in any form, and that if he be called to perform military service, would decline to do so either as a combatant or as a non-combatant.

Upon reaching the age beyond which one, under the Military Training and Service Act, is not liable to military service, plaintiff prompted by his conscience that prevents him to participate in war or in preparation therefor in any form, declined to pay that part of his Federal Income Tax that is budgeted and spent for military purposes, though he offered to pay his taxes in full provided he can do so for constructive purposes. He requested the Internal Revenue Service and the defendants that they make it possible for him to pay his taxes towards positive

national expenditures and not towards destructive war purposes. The department, while recognizing plaintiff's sincerity as a religious objector to war, failed to extend to him the relief asked for, but to the contrary, collected from him, pursuant to a Warrant of Distraint, the sum of $99.78 (plus interest) i.e. the amount that plaintiff withheld on the basis of 50% of his 1952 Income Tax, which 50% plaintiff calculated as being expended for war purposes.

Plaintiff contends that as one who religiously objects to participation in war and to preparation therefor in any form, ought not and under the Constitution cannot be compelled to contribute to military operations by forcing him to finance them with his taxes.

Plaintiff also contends that payment by him of that part of his Income Tax that is expended for war purposes, would deprive him of his status of a conscientious objector to war, since such payment contributes significantly to the war effort.

Plaintiff finally contends that he is entitled to a declaration of his rights as a religious objector to war with reference to the payment of that part of his Income Tax that is budgeted by Congress for war preparation and is expended by the military for such purpose. He maintains that he is entitled to an order for the return to him of the 1952 tax money forcibly collected from him and to an injunction restraining the defendants from collecting from him that part of his Federal Income Tax for the years subsequent to 1952 that are budgeted and expended for war purposes.

I.

AS A MATTER OF LAW, IS A CONSCIENTIOUS OBJECTOR TO WAR IN ANY FORM, WHO IS NOT OF DRAFT AGE, ENTITLED TO THE SAME EXEMPTION AS CONSCIENTIOUS OBJECTORS OF DRAFT AGE, AND, THEREFORE, IS HE TO BE RELIEVED OF THE PAYMENT OF THAT PART OF FEDERAL INCOME TAX THAT IS USED FOR THE PURPOSE OF AND PREPARATION FOR WAR?

The First Amendment to the Constitution of the United States directs that

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ."

Plaintiff maintains that if this Amendment means anything, it means that no one, not even Congress, has the power to prevent him to *exercise* his religion freely. And that is as it ought to be in a free society where the people are the sovereign and all instrumentalities of the Government are the servants of the sovereign. The Amendment ought not and does not mean that one may have a religious belief but be estopped by the law from living according to that belief. The Amendment surely did not contemplate making the people of this country Sunday-Christians (or Sabbath-Jews, or Friday-Mohammedans) who are to act during the week contrary to their Sunday belief. On the contrary, the Amendment assured to everyone "the free exercise of" his religion. Plaintiff asks for no more (but cannot accept anything less) than the right to live his life in accordance with his religious belief; that he may not be interfered with by defendants when he in fact "exercises" his religion.

Plaintiff is, because of religious training and belief, conscientiously opposed in the past and is opposed now to participation in war or in military preparation. His objection to war and to the underlying preparation, dates back many years, emanating from his belief in a Supreme Being. (Tr. 4.) He has given expression to his conscientious objection to war and to military preparation, both orally and in writing, for about two decades. (Tr. 4, Exhibits "A"-"D".)

Plaintiff believes that the Sixth Commandment means just what it says: "Thou shalt not kill". He believes that this means not to kill by any means, at any time, either directly or indirectly. It means that one ought not to kill by heaving a stone, using a spear, a boomerang, a blow-gun, nor a cannon, and least of all an atomic bomb. He believes that raising a loaded gun, directing it against another human being and pulling the trigger to propel the bullet into a living heart of another is killing, forbidden by the Lord's command. He also believes that putting the self-same gun into the hands of another man means to do the killing vicariously, but just as effectively as done by himself. He cannot kill and he cannot buy the guns, nor the bullets, nor the atomic bombs, because in doing so he would do the killing forbidden to him by his conscience.

Plaintiff's position is just as unsophisticated as that. He knows that the Congress of the United States budgets, conservatively stated, 50% of all Federal Income Taxes for war purposes. (Tr. 14.) He knows that at least 50% of his Federal Income Tax is ex-

pended to buy guns, cannons, atomic bombs and other instruments of destruction. (Tr. 8, 9, 10, 11, 13, 14.) As one who conscientiously objects to war and to preparation therefor, plaintiff cannot perform military service in the form of "purchasing armaments." (Tr. 9.) Because of such religious prompting plaintiff withheld 50% of his 1952 income tax. (Tr. 9.) He offered to pay his tax in full if it is used to maintain his country's "free and peaceful institutions". (Tr. 9.) His offer was rejected by defendants, who, while recognizing plaintiff's sincerity, proceeded forceably to collect that part of his 1952 taxes that he refused to pay for the reasons given above. (Tr. 15, 17.)

We are aware that Justice Cardozo in the case of *Hamilton v. Regents,* 263 U.S. 245, 268 (1934) delivered a *dictum* that is opposed to plaintiff's position. We know that the *dictum* of Justice Cardozo frowns upon the exaltation of private judgment "above the powers and the compulsion of the agencies of the Government." Nevertheless, we respectfully submit that the *dictum* of Justice Cardozo is based on a total misconception of both the sovereign right of the people and of the purport of the First Amendment. The true meaning of the First Amendment is disclosed by the non-legalistic understanding presented by Professor Alexander Meiklejohn[1] who compares the Fifth Amendment with the First and concludes that the framers

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[1]Free Speech and its Relation to Self Government, Alexander Meiklejohn (Harper & Bros. Publishers 1948).

"of the Constitution intended by the First Amendment to provide an 'unlimited guarantee of freedom of speech' [and obviously of the free exercise of religion]. The First Amendment:

'. . . correlating the freedom of speech in which it is interested with the freedom of religion, of press, of assembly, of petition for redress of grievances, places all these alike beyond the reach of legislative limitation—beyond even the due process of law. With regard to them, Congress has no negative powers whatever.' "

Professor Meiklejohn, discussing the basis of the Constitution, namely, the compact between the sovereign, the people, and the government, concludes that the freedoms guaranteed by the First Amendment and the injunctions directed to Congress are "The basic postulate of a society which is governed by the votes of its citizens."

We know that the courts have held that the exemption of the conscientious objector from military service is not a right, but a "grant" from Congress, nevertheless, we submit that in such a holding there is a basic misconception as to the right of the sovereign, i.e., the people. It may be that a reconsideration is urgently in order, before freedom perishes through this doctrine that the servant may grant certain rights to the master or withhold them from him.

We know that in *Jacobson v. Massachusetts,* 197 U.S. 11, it was held that a religious objector to war may be compelled, "by force if need be, against his will . . . to take his place in the ranks of the army of

his country, and risk the chance of being shot down in its defense." However, not even the court can say that one can be forced against his will to kill anyone. Nor do we read the *Jacobson* case to say that one may be compelled to contribute his money so that others may be provided with instruments of killing. The only thing that we glean from the *Jacobson* case is the holding that the "country" may compel one to stand up and be killed in its defense. We do not understand how much or how good such "defense" may be, nor do we understand how this holding squares with the one expressed in *Davis v. Beason,* 133 U.S. 333, 342 (1890), where it was said that:

> "With man's relations to his Maker . . . no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people are not interfered with."

Plaintiff fully agrees with the above and further he believes that his action supports a law of society which will "secure its peace and prosperity and the morals of its people." He believes that contribution of tax money to the purchase of armament is destructive of peace; deprives us of true prosperity, and withal corrupts the people's morals. These all are self-evident, so much so that it would require no argument but for the preconceived errors that go for ideas and for the bias and prejudice fed upon such preconceived errors.

A study of the history of mankind reveals to the plaintiff that the acquisition of armaments has always

resulted in the use thereof and never against destructive forces of nature, but always against other humans. Armament in the hand always was and will be destructive of peace and will not contribute in the future, as it has not in the past, to the securing of peace. Plaintiff, acting on such knowledge, stated that he as a loyal American cannot "contribute to the militarization of my country and through its militarization, to the ruin which has overtaken every democracy which has ever taken this course." (Tr. 9.)

Plaintiff is cognizant of and he gladly accepts the obligations of citizenship (Tr. 9, 11, 13.) He did not take the position of a tax objector lightly, but only after long meditation. He has been a conscientious objector to war since 1939, but only 14 years later was he ready in true conscience to refuse in part his tax payment.

> "I have come to the conclusion that I cannot, in conscience, and in love of my country, encourage my country's government to spend my country's substance in the killing of my innocent fellowmen anywhere, or in preparation for killing them, or in preparing my fellow-Americans of military age to kill and to be killed." (Tr. 13.)

Plaintiff believes that Justice Cardozo is not entirely correct when he says in the case of *Hamilton v. Regents* (supra) that the right "of private judgment has never yet been so exalted above the powers and the compulsions of the agencies of government." Plaintiff believes that where "private judgment" derives directly from the command of a Supreme Being,

it is *always* exalted above the powers and compulsions of the agencies of government. One remembers the Prince of Peace, and even such mortals as Giordano Bruno, Thomas Aquinas, the Quakers, and this country's own founding fathers (who appealed their "private judgment" to "the Supreme Judge of the universe"), all of whom believing in the righteousness of their "private judgment" demanded that it be "exalted above the powers and the compulsion of the agencies of government."

Congress recognized the mandate of the First Amendment as to the "free exercise of religion" and therefore when enacting the Military Training and Service Act (Title 50 App. U.S. Code Sec. 453 Selective Service Act of 1948 as amended) exempted from military service those who because of religious training and belief cannot participate in war in any form. It cannot be assumed that Congress would demand of plaintiff, who is beyond draft age, to do military service in the form of purchasing armaments, even though he is opposed to war in any form.

Plaintiff maintains that Congress intended to include him in the exemption to military service, not only because of the Judeo-Christian philosophy underlying the Constitution of this country and its First Amendment, but also because of the specific law of the land incorporating therein the Atlantic Charter (55 Stat. 1600).

On January 1, 1942, twenty-five nations together with the United States subscribed to the Declaration by the United Nations stating, *inter alia,* that:

> "Having subscribed to a common purpose and principles embodied in the Joint Declaration of the President of the United States of America and the Prime Minister of the United Kingdom of Great Britain and Northern Ireland dated August 14, 1941, known as the Atlantic Charter . . ."

The signatories of the latter document stated among others that:

> "They believe that all nations of the world, for realistic as well as spiritual reasons, must come to the abandonment of the use of force . . . no future peace can be maintained if land, sea, or air armaments continue to be employed by nations . . ."

Plaintiff submits that he as a religious objector to war and to preparation therefor in any form, who is beyond draft age, cannot under the Constitution and the laws enacted pursuant thereto be compelled to perform military service in the form of armament purchase exacted from him in the form of taxes. Therefore, the prayer of his complaint should have been granted. The trial court erred in denying the prayer of plaintiff's complaint.

II.

AS A MATTER OF LAW, IS THE EXEMPTION FROM MILITARY SERVICE GIVEN TO CONSCIENTIOUS OBJECTORS OF DRAFT AGE AND THE REFUSAL TO EXEMPT OBJECTORS BEYOND DRAFT AGE FROM THEIR PART IN MILITARY PREPARATION, CLASS LEGISLATION FORBIDDEN BY THE CONSTITUTION OF THE UNITED STATES?

Whether as a grant or as a basic right, Congress in fact exempted from military service all of those of draft age who because of religious training and belief are conscientiously opposed to war in any form.

Title 50, App. U.S. Code sec. 451 et seq. among others, states on that score (Section 456j) that:

> "Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States, who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regula-

> tions as the President may prescribe, to perform . . . such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate . . . ''

For the purpose of plaintiff's pertinent argument the proviso that one who '' . . . is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, . . . to perform . . . such *civilian work* contributing to the maintenance of the national health, safety or interest . . . '' is of crucial importance. The law exacts from a conscientious objector, in ''lieu of induction'', ''work of national importance.'' However this work to be performed is ''civilian work,'' thus giving full recognition to the objector's religious disability to perform work within the jurisdiction and under the supervision of the military.

It is not denied, but, on the contrary, it is admitted by the Government that plaintiff is a sincere religious objector to war in any form. (Tr. 15, also Exhibit ''H''.) Nevertheless, defendants insist that plaintiff perform military service in the form of contributing his tax money to the purchase of armaments, which purchases are made and the moneys are expended exclusively under military direction. Were such interpretation the intent of Congress, there would result a preference given to conscientious objectors of draft age, as against those in the same classification, but above draft age, a discrimination not permitted by the laws of the United States.

The courts have often passed upon laws which appeared to discriminate in favor of one group against another. The courts have permitted such discrimination, *provided* there was a reasonable basis for the classification and discrimination. It is submitted that there is no reasonable basis to discriminate between conscientious objectors of draft age and those beyond it. The reasonable classification encompasses conscientious objectors as against those who can in conscience perform military service. The status denied by the Government for the above-draft-age conscientious objectors as against those of draft age, is unreasonable, and justified neither on legal nor moral grounds. Such unreasonable discrimination would be class legislation forbidden by the laws.

Fourteenth Amendment to the Constitution of the United States;
Board of Education v. Barnette, 319 U.S. 624;
Girourard v. United States, 328 U.S. 61.

One is to assume that a law enacted by Congress is constitutional. Plaintiff assumes that the Military Training and Service Act (Title 50 App. U.S. Code Sec. 451 et seq.) and particularly Sec. 423 pertaining to conscientious objectors is constitutional and that therefore could not have intended, as class legislation, to discriminate against those who, like plaintiff, are, under current Selective Service regulations, beyond draft age.

It is submitted that on the above basis plaintiff's prayer for relief should have been granted and the

trial court was in error in entering its order of March 18, 1957 to the contrary effect. The order ought to be reversed.

III.

AS A MATTER OF LAW, IS THE FORCIBLE COLLECTION OF THAT PART OF THE TAXES THAT ARE SPENT FOR WAR PURPOSES, FROM ONE WHO BECAUSE OF RELIGIOUS BELIEF AND TRAINING IS OPPOSED TO WAR IN ANY FORM, CONTRARY TO THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

In *Cantwell v. Connecticut,* 310 U.S. 296, 303-4, the Supreme Court of the United States in examining the concepts underlying the First Amendment said that it:

> ". . . embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society."

Admitting, *arguendo,* that religious freedom "to act" is or cannot be absolute and that it must be subject to regulation, the question remains: for what purpose? The *Cantwell* case gives the answer "for the protection of society." Here plaintiff submits that his action, i.e., refusal to pay for the purchase of armaments is the only method by which society can and will be protected. A contrary argument will lead us into a dead-end street, both figuratively and factually.

Let us follow the contrary argument *ad absurdum.* Let us maintain that the manufacture and stockpiling of nuclear weapons is for the "protection of society."

Now, there is no disagreement that nuclear explosions create radiation debris that endangers all living things and in reaching a certain amount will be lethal to things living. There is no, and cannot be any disagreement that nuclear weapons may be exploded either by design or by accident. There cannot be any disagreement that such explosion, and concomitant pollution of the air, soil, and water with hazardous radiation can occur as long as nuclear weapons are manufactured and stockpiled. *Ergo,* to argue that the paying for the stockpiling of nuclear weapons is "for the protection of society" is putting us on the other side of the Looking Glass in Alice in Wonderland.

Plaintiff, in his refusal to pay that part of his taxes that is used for armaments, placed himself on the realistic side of the Looking Glass, and at the same time under the protection of the *Cantwell* case because his freedom of religious action is for "the protection of society." His freedom of religious action is also in accord with *Davis v. Beason* (supra) since such action is the only action designed to secure to society "its peace and prosperity, and the morals of its people."

While in the foregoing plaintiff did, *arguendo,* agree with the holding of the *Cantwell* case, now he will show that the Supreme Court itself, in subsequent decisions, doubted the correctness of the *Cantwell* holding.

The case of *United States v. MacIntosh,* 283 U.S. 605, 625, was decided in 1931. Here the right to citi-

zenship was denied to Professor MacIntosh, because of his refusal in conscience to take the oath to defend this country with force if necessary. The reasoning adapted in this case as to the First Amendment was similar to the one adapted in the *Cantwell* case nine years later, in 1940, and similar to that in *Davis v. Beason,* adopted 41 years earlier. (See also *United States v. Schwimmer,* 279 U.S. 644; *Jacobson v. Massachusetts* (supra), and *Hamilton v. Regents* (supra).

Beginning with *Board of Education v. Barnette* (supra), continuing with *United States v. Ballard,* 322 U.S. 78, 86 and culminating with *United States v. Girourard,* 328 U.S. 61, the Supreme Court held contrary to the *Cantwell* and other cases above, and interpreted the First Amendment in a manner which, as the plaintiff submits, upholds his position, put into issue here. In the *Girourard* case the court held:

> "... the struggle for religious liberty has through the centuries been an effort to accommodate the demand of the State to the conscience of the individual. The victory for freedom of thought recorded in our *Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State.* Throughout the ages, men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle ..." (Emphasis supplied.)

To interpret the First Amendment as does the *Girourard* case upholds the position of plaintiff, and

the contrary holding of the trial court's order of March 18, 1957, must therefore be reversed.

IV.

THE COURTS HAVE HELD THAT CONTRIBUTION TO WAR IN ANY SUBSTANTIAL FORM, PRIOR TO INDUCTION, IS IN CONFLICT WITH THE CLAIM OF CONSCIENTIOUS OBJECTION TO MILITARY SERVICE. AS A MATTER OF LAW, WILL A CONSCIENTIOUS OBJECTOR LOSE HIS STATUS AS SUCH IF HE SO PAYS THAT PART OF HIS TAXES THAT IS SPENT FOR WAR PREPARATION, BECAUSE PAYMENT OF SUCH TAX IS CONTRIBUTION TO WAR IN A SUBSTANTIAL FORM?

Plaintiff's position, that he, as a conscientious objector, may not contribute to war without losing his status as such objector, is upheld by the courts, among them the Supreme Court of the United States. The cases so holding are *Perry Bowen Moore v. United States,* 217 F.2d 428; 348 U.S. 966 and *Witmer v. United States,* 75 S.Ct. 392.

Moore's claim as a conscientious objector was denied even though it was admitted that his religious training and belief clearly brought him within the purview of the Congressional grant of exemption. His church was recognized to be a fundamentalist pacifist church. Its pacifist position brought about antagonism towards it on the part of the community, and this antagonism prevented the church members during the First World War from obtaining a livelihood. To keep alive, some members organized a home industry making ladies' aprons, candy, and, later, garden tractors and implements. The industry employed both church and non-

church members, and among the former the defendant Moore, who was working as a common laborer. During World War II this industrial establishment sold candy to the Armed Forces of the United States. It also sold some ladies' dresses to be used by the female members of the Armed Forces. Under the above circumstances, the United States Court of Appeals for the Seventh Circuit held on December 9, 1954, that Moore's claim for exemption as a conscientious objector may be properly denied by Selective Service on the ground that

> "His church on whose tenets his claim of exemption rests, though devoted to pacifist doctrines, *contributed to the war efforts of this country by manufacturing supplies and equipment for the Armed Forces.*" (Emphasis ours.)

The inference from the above decision is plain, and that is, that a conscientious objector to war must not, on penalty of forfeiting his previous status as a conscientious objector, contribute to war by paying that part of his taxes that is used for the purchase of military equipment or the payment of military personnel.

This inference becomes still plainer when we read the Government's contention as presented in its brief before the Supreme Court of the United States (521 October Term 1954, 348 U.S. 966). The contention was that Moore was justly denied classification as a conscientious objector because

> "His religious community had no compunction against acting as a war contractor for the Government during World War II, and apparently was

> content to profit from the war situation as a direct supplier to the war effort. Such willingness to cooperate toward the prosecution of the war is entirely inconsistent with conscientious objection to a non-combatant participation in war in any form."

In the instant case plaintiff's contribution of his tax money to buy military equipment is just as inconsistent with his claim as conscientious objector as was Moore's working as a common laborer in a factory making candy and ladies' dresses, some of which were sold to the Army. We submit that contribution of tax money to war is more direct since it is made by the individual himself, while a common laborer, as Moore was, has no say-so about the factory's supplying its customers. (The *Moore* case was reversed by the Supreme Court on other grounds than the ones here discussed, and, therefore, the decision of the United States Court of Appeals for the Seventh Circuit as to the reasoning hereinabove set forth stands unreversed.)

Like plaintiff's sincerity in the instant case, so was the sincerity of Moore recognized by the Government, nevertheless the Government contended against his being granted exemption as a conscientious objector. About Moore and his church, the Government's brief before the Supreme Court of the United States stated thus:

> "He and his church were opposed to force. He and his colleagues never struck a blow in anger or in self-defense. They held no malice for harm

> done to them by others. When their congregation was fired upon during a religious meeting, none of the members appeared to testify against the would-be murderers. They submit quietly and without reprisal to indignities, insults and even assaults."

Nevertheless, said the Government, Moore, who was a common laborer in a factory which supplied candy and ladies' garments on contract to the Armed Forces of the United States

> "was engaged in supplying materiel under Government contract for shipment to the Armed Services. *His position was no less proximate to the fighting than any stateside troops of the Supply Services.*" (Emphasis supplied.)

And, said the Government, Moore "at no time has repudiated the stand taken by his church in the manufacture of war supplies" and therefore he was not entitled to the classification of a conscientious objector.

The above contention of the Government in the *Moore* case and the holding of the United States Court of Appeals for the Seventh Circuit (217 F. 2d 428) force the conclusion that a conscientious objector must refuse to make any contribution to war and must also repudiate any willingness to do so. He must refuse to pay monies which are used for war. If he fails to do so, he forfeits his right subsequently to claim exemption from military service.

That such a contention may, and likely will be, upheld by the Supreme Court of the United States can

be seen from the case of *Witmer v. United States,* 75 S. Ct. 392. In that case Witmer refused to be inducted after his claim for exemption as a conscientious objector was denied by his Local Selective Service Board, as well as by the Appeal Board. The District Court found him guilty of refusing to obey the order of induction, and such conviction was upheld by the Supreme Court because that court doubted his sincerity as a conscientious objector, saying:

> "Although he asserted his conscientious objector belief in his first exemption claimed, in the same set of papers he promised to increase his farm production and 'contribute a satisfactory amount for the war effort'. Subsequently, he announced 'the boy who makes the snowball is just as responsible as the boys who throw them.'"

The Supreme Court, while not declaring whether it agreed with the first or second of Witmer's quoted statements above, concluded that "these inconsistent statements in themselves cast considerable doubts on the sincerity of petitioner's claim" of being a conscientious objector.

In the instant case, plaintiff says with Witmer that "the boy who makes the snowball is just as responsible as the boys who throw them". At the same time, however, he maintains a consistent position and declares that he is unable to contribute that part of his taxes which is used for war. By doing so, he hopes to escape the onus that would be placed upon him by the *Witmer* decision which is so obviously applicable here.

The decisions in the *Moore* and *Witmer* cases take the contention raised by the complaint out of the sphere of speculation and therefore the prayer of his complaint should have been granted. The trial court erred in granting defendants' motion to dismiss, and therefore this Court ought to reverse the order of March 18, 1957.

V.

THE DRAFT AGE IS SUBJECT TO CONGRESSIONAL CHANGE, AND THEREFORE, ONE WHO IS BEYOND DRAFT AGE MAY BECOME SUBSEQUENTLY SUBJECT TO DRAFT. AS A MATTER OF LAW, WILL A CONSCIENTIOUS OBJECTOR BEYOND DRAFT AGE WHO, PRIOR TO BEING CONSCRIPTED, PAYS THAT PART OF HIS TAXES THAT IS SPENT FOR WAR PURPOSES, BECOME SUBJECT TO MILITARY SERVICE, IF THE DRAFT AGE IS RAISED, BECAUSE HIS CONTRIBUTION TO WAR IN THE FORM OF HIS TAX PAYMENT DEPRIVED HIM OF HIS CLAIM TO BE RECOGNIZED AS A CONSCIENTIOUS OBJECTOR TO WAR?

While it is true that at the present time, plaintiff is beyond the age limit for draftees, it cannot be gainsaid that Congress has the power to raise the age limit so that plaintiff will be made available for military service. By contributing to war by paying the war budgeted part of his taxes, he forfeits his status as a conscientious objector and in case of change of the age limit he will be compelled to do military service, in spite of his religious objection and in spite of the law granting exemption to other objectors. Such a contingency is not speculative; it is, in fact, less so than were the circumstances in the case of *In re Clyde Wilson Summers,* 325 U.S. 561.

In that case Summers graduated from the Law School of the University of Illinois with high honors. As a religious objector to war he claimed and obtained from his Local Draft Board a classification as a conscientious objector, and during World War II he did go to a Civilian Public Service Camp, there, in lieu of induction into military service, to do work of national importance. After the war he passed the Illinois Bar Examination. However, his admission to practice before the courts of that state was denied on the recommendation of the Committee on Character and Fitness which held that Summers, being a pacifist, was not morally fit to practice law.

Summers petitioned the Supreme Court of Illinois asking that he be admitted to the Bar notwithstanding the unfavorable report of the Committee on Character and Fitness. The Supreme Court sustained the Committee and excluded Summers from the practice of law in that state.

On a writ of certiorari to the Supreme Court of the State of Illinois, the Supreme Court of the United States reviewed the proceedings holding that there was a case or controversy involved. The Supreme Court, by a four to four decision (Justices Black, Douglas, Murphy and Rutledge dissenting, and Justice Jackson not participating), upheld the Supreme Court of Illinois in excluding Summers from the practice of law because of his conscientious objection to war.

The Supreme Court of the United States, speaking through Justice Reed, found that

"The sincerity of petitioner's beliefs are not questioned. He has been classified as a conscientious objector under the Selective Training and Service Act of 1940, 54 Stat. 885, as amended. Without detailing petitioner's testimony before the Committee or his subsequent statements in the record, his position may be compendiously stated as one of non-violence. Petitioner will not serve in the armed forces. While he recognizes a difference between the military and police forces, he would not act in the latter to coerce threatened violations. Petitioner would not use force to meet aggression against himself or his family, no matter how aggravated or whether or not carrying a danger of bodily harm to himself or others. He is a believer in passive resistance. We need to consider only his attitude toward service in the armed forces."

Nevertheless, Summers was forbidden to practice his profession because

"Illinois has constitutional provisions which require service in the militia in time of war of men of petitioner's age group. The return of the Justices[2] alleges that petitioner has not made any showing that he would serve notwithstanding his conscientious objections. This allegation is undenied in the record and unchallenged by brief. We accept the allegation as to unwillingness to serve in the militia as established. While under Section 5(g) of the Selective Training and Serv-

[2]Summers asked for and the Supreme Court of the United States issued a Rule to show cause to the Chief Justice and Associate Justices of the Supreme Court of Illinois, why Summers ought not to be licensed to practice law in the State of Illinois.

> ice Act, supra, conscientious objectors to participation in war in any form now are permitted to do non-war work of national importance, this is by grace of Congressional recognition of their beliefs. *Hamilton v. Regents,* 293 U.S. 245, 261-65, and cases cited. The Act may be repealed. No similar exemption during war exists under Illinois law. The Hamilton decision was made in 1934, in time of peace. This decision as to the powers of the state government over military training is applicable to the power of Illinois to require military service from her citizens."

The service requirements mentioned pertain to the constitution of Illinois of 1870, Art. XII, Sec. 1 as amended. This section provides for a state militia consisting of

> ". . . all able bodied male persons resident in the state, between the ages of 18 and 45, except such persons as now are, or hereafter may be, exempted by the laws of the United States, or of this state."

How farfetched, not to say speculative, the reasons were on the basis of which Summers was excluded from the practice of law may be seen from the dissent of Justice Black who asked:

> "Whether a state which requires a license as a prerequisite to practice law can deny an applicant a license solely because of his deeply rooted religious convictions. The fact that petitioner measures up to every other requirement for admission to the Bar set by the state demonstrates beyond doubt that the only reasons for his rejection was his religious beliefs."

Justice Black supports the above statement by the fact that the State of Illinois does not deny that Summers possesses the following qualifications:

> "He is honest, moral, and intelligent, has had a college and a law school education. He has been a law professor and fully measures up to the high standards of legal knowledge Illinois has set as a prerequisite to admission to practice law in that State. He has never been convicted for, or charged with, a violation of law. That he would serve his clients faithfully and efficiently if admitted to practice is not denied. His ideas of what a lawyer should be indicate that his activities would not reflect discredit upon the bar, that he would strive to make the legal system a more effective instrument of justice. Because he thinks that 'Lawsuits do not bring love and brotherliness—just create antagonisms,' he would, as a lawyer, exert himself to adjust controversies out of court, but would vigorously press his client's cause in court if efforts to adjust failed. Explaining to his examiners some of the reasons why he wanted to be a lawyer, he told them: 'I think there is a lot of work to be done in the law . . . I think the law has a place to see to it that every man has a chance to eat and a chance to live equally. I think the law has a place where people can go and get justice done for themselves without paying too much, for the bulk of people that are too poor.' No one contends that such a vision of the law in action is either illegal or reprehensible. The petitioner's disqualifying religious beliefs stem chiefly from a study of the New Testament and a literal acceptance of the teachings of Christ as he understands them. Those beliefs are these:

"He is opposed to the use of force for either offensive or defensive purposes. The taking of human life under any circumstances he believes to be against the Law of God and contrary to the best interests of man. He would if he could, he told his examiners, obey to the letter these precepts of Christ: 'Love your Enemies; Do good to those that hate you; Even though your enemy strike you on your right cheek, turn to him your left cheek also.' The record of his evidence before us bears convincing marks of the deep sincerity of his convictions, and counsel for Illinois with commendable candor does not question the genuineness of his professions."

Justice Black points out speculatively that under the test applied to Summers none of the Quakers who "have had a long and honorable part in the growth of our nation . . . could qualify for the Bar in Illinois," and further says Justice Black:

"The conclusion seems to me inescapable that if Illinois can bar this petitioner from the practice of law it can bar every person from every public occupation solely because he believes in nonresistance rather than in force. For a lawyer is no more subject to call for military duty than a plumber, a highway worker, a Secretary of State, or a prison chaplain."

"It may be, as many people think, that Christ's Gospel of love and submission is not suited to a world in which men still fight and kill one another. But I am not ready to say that a mere profession or belief in that Gospel is a sufficient reason to keep otherwise well qualified men out of the legal profession, or to drive law-abiding law-

yers of that belief out of the profession, which would be the next logical development."

We submit that in the instant case plaintiff's claim as to the possible contingency, i.e., Congress' raising the draft age, is less speculative than was the possibility of Summers' being called to serve in the militia, because, as Justice Black said,

> "The state's denial of petitioner's application to practice law resolves itself into a holding that it is lawfully required that all lawyers take an oath to support the state constitution and that petitioner's religious convictions against the use of force make it impossible for him to observe that oath. The petitioner denies this and is willing to take the oath. The particular constitutional provision involved authorizes the legislature to draft Illinois citizens from 18 to 45 years of age for militia service. It can be assumed that the State of Illinois has the constitutional power to draft conscientious objectors for war duty and to punish them for a refusal to serve as soldiers—powers which this Court held the United States possesses in *United States v. Schwimmer,* 279 U.S. 644, and *United States v. McIntosh,* 283 U.S. 605. But that is not to say that Illinois could constitutionally use the test oath it did in this case."

and further

> "The Illinois Constitution itself prohibits the draft of conscientious objectors except in time of war and also excepts from militia duty persons who are 'exempted by the laws of the United States.' It has not drafted men into the militia since 1864, and if it ever should again, no one can say that it will not, as has the Congress of

> the United States, exempt men who honestly entertain the views that this petitioner does. Thus the probability that Illinois would ever call the petitioner to serve in a way has little more reality than an imaginary quantity in mathematics."

The speculative ground for Summers' exclusion from the profession of law was one that had not existed since 1864; nevertheless, the Supreme Court, in upholding Summers' exclusion from the Bar of Illinois, assumed speculatively that such contingency may occur. Congress before, during, and after World War II, changed the draft age a number of times, and it may do so again to the extent that plaintiff here will be reached notwithstanding that he, at the present, is beyond the existing draft age. His reasons are no more but rather less speculative than the ones upheld in the Supreme Court of the United States in the *Summers* case; and, therefore, we respectfully submit that the circumstances here prevailing demand the reversal of the order of March 18, 1957.

VI.

AS A MATTER OF LAW, IS A CONSCIENTIOUS OBJECTOR TO WAR IN ANY FORM, WHO IS BEYOND DRAFT AGE, ENTITLED TO A DECLARATION OF HIS RIGHTS WITH REFERENCE TO HIS REFUSAL TO PAY THAT PART OF HIS TAXES THAT ARE SPENT FOR WAR PURPOSES?

Plaintiff believes that the answer is Yes. 28 U.S.C. par. 2201 (1952) grants any court of the United States the power to declare the rights and other legal relations of any interested party seeking such declaration.

That is true even with respect to Federal taxes when there are extraordinary or exceptional circumstances present.

In the case of *Hudson v. Crenshaw,* 130 F. Supp. 166, it is stated that courts should not interfere in the absence of extraordinary or exceptional circumstances with the collection of taxes when there is administrative remedy available to the taxpayer.

The complaint here clearly indicates that plaintiff attempted over a period of years to obtain administrative remedy without avail. The complaint also clearly sets forth that the circumstances surrounding the plaintiff are extraordinary and exceptional. They are such because his religious training and belief prevent him from participating, in conscience, in war in any form. His sincerity is unquestioned, as it is shown by the complaint; it is unquestioned that Congress granted exemption from military service to conscientious objectors. (U.S.C. Title 50, App. Sec. 451-470; particularly Section 6(j).)

We have shown that, in the *Moore* and *Witmer* cases, the courts of the United States uphold the right to exemption from military service only of those who maintain a consistent pacifist position at all times, and, therefore, plaintiff is bound by such court holdings to declare himself at all times to be a conscientious objector, and to comport himself accordingly at all times, on pain of forfeiting his claim to the status thereafter. Because of the extraordinary and exceptional circumstances thus prevailing in the instant case, the plaintiff is entitled to the declaration of his legal

rights *vis-à-vis* the use of his tax money for war purposes.

As we shall show in the next Section VII of this brief pertaining to injunctional remedy, the courts have jurisdiction in the instant case to issue an injunction as prayed for by plaintiff. It was said in the case of *Excelsior Life Insurance Company v. Thomas,* 49 F. Supp. 90 (1943), the court which has authority to restrain issuance of a distraint warrant by a collector of taxes must have power to declare the rights of the parties in connection with the property.

VII.

AS A MATTER OF LAW, IS A CONSCIENTIOUS OBJECTOR TO WAR IN ANY FORM, WHO REFUSES TO PAY THAT PART OF HIS TAXES THAT IS SPENT FOR WAR PURPOSES, ENTITLED TO A RESTRAINING ORDER AGAINST FORCIBLE ATTEMPT TO COLLECT SUCH TAX?

Internal Revenue Code 1954 (26 U.S.C.A. Sec. 7421) prohibits suits under *normal circumstances* to restrain assessment or collection. To understand the implications of Section 7421 of the Internal Revenue Code of 1954 (and the similar provisions contained in Section 3653 of the Internal Revenue Code of 1939), it is well worthwhile to refer to the historical note as it is set forth in *Calwalader v. Sturgess,* 297 F. 73, wherein it is said

> "It is necessary to the maintenance of the Government that the collection of taxes imposed for this purpose shall not be hindered or delayed, either by those who are charged with their payments, or by the courts in their behalf. Therefore,

> the law requires, broadly, that all taxes, even those 'erroneously or illegally assessed', shall be paid when due. The Congress knew, of course, that injustice would occasionally be done by the enforcement of this necessary rule. Therefore, it prescribed a method by which one who has paid a tax 'erroneously or illegally assessed or collected' may recover it. This method contemplates, first, payment of the tax. It then provides for an application to be addressed to the Commissioner of Internal Revenue for refund of the tax. If the application be granted, his grievance has been satisfied; if it be rejected, *he may bring suit against the collector in a court of law to recover the amount of the tax and there succeed or fail according to the merits of the case.*" (Emphasis supplied.)

With reference to the above section the court stated in *Holland v. Nix,* 214 F. 2d 317 (1954) that

> "*This section* is general in its terms and *should not be construed as abrogating the equitable principles which permit actions to restrain collection where* the exactation is illegal or there *exist special and extraordinary circumstances sufficient to bring case within some acknowledged head of equity jurisdiction.*" (Emphasis supplied.)

As we set forth the facts in our complaint, the circumstances are special and extraordinary, and because of those circumstances there is sufficient reason to bring the case within the equity jurisdiction of the court. The circumstances surrounding plaintiff's case are extraordinary, not because of unconstitutionality of the Statute (which the plaintiff did not

claim), nor because of illegality of the collection (the plaintiff expressed willingness to pay his taxes in full provided that can be done in full recognition of his conscientious objection to war). The circumstances are special and extraordinary because Congress while recognizing the right of conscientious objectors to be exempted from military service, failed to make similar provision respecting the status of those conscientious objectors who are not of draft age. The circumstances are special because, as we set forth in Section IV of this brief, the courts have forewarned conscientious objectors to be and remain consistent in their attitude towards participation in war and preparation therefor, and when plaintiff so declared his attitude he was informed by the administrative agency that there are no remedies available to him. The courts also declared repeatedly and without any question of doubt that Congress has the right to extend the draft age at any time, so as to make plaintiff available for military service unless his claim as a conscientious objector is upheld.

See also *Miller v. Nut Manufacturing Co.,* 284 U.S. 498, 52 S.Ct. 260, 76 L. Ed. 422, which holds that collection of taxes may be enjoined under special and extraordinary circumstances which bring the case within equity jurisdiction. Here the plaintiff's case presents not only an extraordinary circumstance for equity to interfere but one where the most extreme urgency is present, due to the threatened penalty. The penalty is the loss of the status of conscientious objector as we have shown in Sections IV and V of this brief.

Because equity demands that the courts extend protection to plaintiff against his being penalized, and when no remedy at law is available, and the trial court in dismissing the cause erred, therefore the order of dismissal ought to be reversed.

THE QUESTION OF NECESSARY PARTIES.

We believe that with the foregoing, while presenting plaintiff's positive claims, we also answered defendants' first three points in their "Notice of Motion to Dismiss". (Tr. 46, 47.) There is a fourth point raised by defendants, i.e., that "plaintiff has failed to join indispensable parties". (Tr. 47.)

Defendants' Motion does not tell what "parties" are indispensable to the maintenance of the suit. Therefore we shall argue this point in general terms.

In the case of *Bernstein, et al., etc., v. Herren,* 136 F. Supp. 493, the plaintiffs who were inductees in the Army of the United States sued the Commanding General of the training camp and asked that the court issue an injunction against the General, restraining him from discharging the plaintiffs otherwise than with an "honorable discharge." The Government moved that the cause be dismissed, because the Secretary of the Army was not joined and he is an indispensable party. The court denied the motion to dismiss and stated:

> ". . . it is argued that the failure to join the Secretary of the Army, at whose instance final action would be taken under AR 604-10, is a

failure to join an indispensable party, an incurable defect because the Secretary's residence is in the District of Columbia. Under *Williams v. Fanning,* 332 U.S. 490, and *Shaughnessy v. Pedreiro,* 349 U.S. 48, that contention is without merit. The distinction is urged that an injunction against the defendant would call for an affirmative act which he is powerless to perform. As already indicated, it is not at this time clear that he lacks the necessary power. It is furthermore not clear at this time that a mandatory act on the part of the defendant would be required, on the ground that a restraint upon the defendant may well operate on his subordinates as his agents. In any event, this court has the power, in the appropriate circumstances, to issue a mandatory injunction, *Trautwein v. Moreno Mut. Irr. Co.,* (9 Cir.) 22 F. 2d 374, and there is no present basis for holding that such a process would be ineffective against the officer now before the court. Cf. *Levin v. Gillespie,* 121 F. Supp. 726."

See also:

Work v. United States ex rel. Rives, 276 U.S. 175;

Williams v. Fanning, 332 U.S. 490;

Levin v. Gillespie, 121 F.Supp. 726.

CONCLUSION.

The issues presented by this appeal are extremely simple. It is submitted that the legal problems involved, if viewed from the basic philosophy underlying the American Constitution, are similarly simple.

The intent of those who formulated the First Amendment to the Constitution was not ambiguous. Those who insisted that the First Amendment be formulated, and be made part of the Constitution, intended that certain freedoms such as those of speech, religion, press, assembly, be placed "beyond the reach of legislative limitation." The framers of the Constitution wrote that document with full awareness that it and the freedoms guaranteed by the Bill of Rights are "the basic postulates of a society which is governed by the votes of its citizens."

Plaintiff as a religious objector to war and to preparation therefor cannot participate in, nor can he contribute to, war in any form. Payment of taxes with which to buy military armaments is contributing to war in a substantial manner. Plaintiff ought not and under the Constitution cannot be compelled to do so.

The order of the trial court of March 18, 1957, is contrary to the Constitutional concept hereinbefore presented and therefore it was entered in error. For the reasons argued by plaintiff, the order of March 18, 1957, ought to be reversed by this Honorable Court.

Dated, Carmel, California,
September 10, 1957.

Respectfully submitted,
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